

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

CFA NORTHERN CALIFORNIA, INC.,

No. C 04-5049 CW

Plaintiff,

ORDER GRANTING  
IN PART MOTION  
TO DISMISS AND  
DENYING MOTION  
TO TRANSFER  
VENUE

v.

CRT PARTNERS LLP, CLAIRE THOMAS and  
ROBERT CAMPBELL,

Defendants.

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Defendants move for dismissal of this action pursuant to Federal Rules of Civil Procedure Rule 12(b)(2) and 12(b)(6). In the alternative, Defendants move under 28 U.S.C. § 1404(a) for an order transferring this action to the District of Arizona. Plaintiff opposes the motions. The motions were heard on June 24, 2005. Having considered the parties' papers, the evidence cited therein and oral argument on the motions, the Court grants Defendants' motion to dismiss the claims against Defendant Robert Campbell and denies their motion to dismiss the claims against Defendant CRT and Defendant Claire Thomas and denies

1 Defendants' alternative motion to transfer venue.

2 BACKGROUND

3 Except where indicated otherwise, the following information  
4 is taken from the Amended Complaint and the Affidavit of Claire  
5 Thomas appended to Defendants' motion. Plaintiff CFA Northern  
6 California, Inc. is a California corporation having its  
7 principal place of business in California. Defendant CRT  
8 Partners, LLP (CRT) is an Arizona limited liability partnership  
9 having its principal place of business in Arizona. Defendants  
10 Claire Thomas and Robert Campbell are United States citizens and  
11 residents of Arizona.

12 CRT operates eighteen Jack-in-the-Box restaurants in or  
13 near Tucson, Arizona, and has done so for at least ten years.  
14 The restaurants are situated on land that is leased to CRT.  
15 Claire Thomas is the managing partner of CRT. Robert Campbell  
16 is also a partner in CRT. Thomas declares that the owners of  
17 CRT own two limited liability companies that own the land on  
18 which fourteen of the eighteen Jack-in-the-Box restaurants are  
19 situated. The other four restaurants are situated on land  
20 leased from other parties. Jack-in-the-Box is a California  
21 corporation headquartered in San Diego. CRT signed Jack-in-the-  
22 Box franchise agreements that call for interpretation and  
23 enforcement under California law and provide for forum and venue  
24 in California for resolving disputes. CRT also apparently  
25 receives goods from California suppliers. While Defendants  
26 contend that they order supplies and receive invoices from an  
27 Arizona distribution center warehouse, they do not dispute that

1 the goods originate in California. Thomas has made at least one  
2 trip annually to Jack-in-the-Box headquarters in California  
3 since the franchise agreements have been in place.

4 Plaintiff is a financial intermediary that introduces  
5 potential purchasers of companies and businesses to potential  
6 sellers. Plaintiff originally contacted Defendants about a  
7 potential business venture. Thomas wished to retire from the  
8 restaurant operation business, and her partners at CRT had  
9 agreed to find a buyer for the business. After several phone  
10 calls and letters between Plaintiff's representative, Jeff  
11 Johnson, and Thomas, Thomas called Johnson and they agreed to  
12 meet in April, 2003 in California to discuss possible assistance  
13 Plaintiff might provide CRT in selling its business. Thomas  
14 asserts that this meeting occurred during a trip she had taken  
15 to visit her sister. Plaintiff alleges that at that meeting  
16 Thomas told Johnson that she and Campbell each owned fifty  
17 percent of CRT.

18 Negotiations continued in Arizona. On or about May 16,  
19 2003, Plaintiff entered into a contract with CRT for the purpose  
20 of assisting CRT in selling its franchise business. The  
21 contract provided that CRT would pay Plaintiff for its services  
22 if a transaction transferring ownership to an "Interested  
23 Party," as further defined by the contract, occurred, even as  
24 long as a year after the termination of the contract. The  
25 contract explicitly excluded real estate from the business  
26 interest for which Plaintiff would seek a buyer. The contract  
27 provided that, in case of a dispute, the parties would seek  
28

1 mediation in Arizona, and Arizona law would apply to the  
2 dispute. Thomas and Campbell signed the contract for CRT.

3 Plaintiff prepared a "Descriptive Report," describing the  
4 business for sale, that included references to the leases for  
5 the land on which the restaurants were situated. Plaintiff  
6 identified approximately forty-two possible acquirers of CRT,  
7 but none made an offer CRT found acceptable. Most of the work  
8 Plaintiff did to fulfill the contract occurred in California.  
9 In January, 2004, CRT terminated its contract with Plaintiff.

10 Before signing the contract, Thomas had told Johnson that  
11 she would like to sell to Laura Olguin, CRT's Vice-President of  
12 Operations, but could not, because of Jack-in-the-Box's  
13 franchisee requirements. Later, the franchisee requirements  
14 were changed such that Olguin became a qualified purchaser. On  
15 or about May 8, 2004, CRT purchased Thomas's interest in the  
16 partnership. Olguin was listed as a partner in CRT in the  
17 May 8, 2004 purchase agreement. Thomas asserts that she and  
18 Campbell had sold Olguin a ten percent interest in the  
19 partnership in 2000. The purchase agreement excluded Thomas's  
20 interest in the entities that owned the real estate on which  
21 fourteen of the restaurants were situated and was subject to a  
22 condition precedent that CRT's leases be amended to reflect the  
23 change in CRT's partners. Plaintiff alleges that Defendants at  
24 first concealed the May 8, 2004 purchase by CRT of Thomas's  
25 interest in CRT. Plaintiff and Defendants dispute whether they  
26 intended the May 16, 2003 contract between Plaintiff and CRT to  
27 include a possible transaction between CRT and Thomas.

1 On November 30, 2004, Plaintiff filed the original  
2 complaint against Defendants. On March 15, 2005, Defendants  
3 filed a motion to dismiss. On March 31, 2005, Plaintiffs filed  
4 an amended complaint alleging (1) breach of contract, (2) unjust  
5 enrichment, (3) conspiracy to defraud and (4) fraud, and  
6 claiming attorney's fees. On April 22, 2005, Defendants filed  
7 this motion.

#### 8 LEGAL STANDARD

##### 9 I. Personal Jurisdiction

10 Under Rule 12(b)(2) of the Federal Rules of Civil  
11 Procedure, a defendant may move to dismiss for lack of personal  
12 jurisdiction. The plaintiff then bears the burden of  
13 demonstrating that jurisdiction exists. Schwarzenegger v. Fred  
14 Martin Motor Co., 374 F.3d 797, 800 (9th Cir. 2004). The  
15 plaintiff "need only demonstrate facts that if true would  
16 support jurisdiction over the defendant." Ballard v. Savage, 65  
17 F.3d 1495, 1498 (9th Cir. 1995); Fields v. Sedgwick Assoc.  
18 Risks, Ltd., 796 F.2d 299, 301 (9th Cir. 1986). Uncontroverted  
19 allegations in the complaint must be taken as true. AT&T v.  
20 Compagnie Bruxelles Lambert, 94 F.3d 586, 588 (9th Cir. 1996).  
21 However, the court may not assume the truth of such allegations  
22 if they are contradicted by affidavit. Data Disc, Inc. v.  
23 Systems Technology Associates, Inc., 557 F.2d 1280, 1284 (9th  
24 Cir. 1977). Conflicts between in the evidence must be resolved  
25 in the plaintiff's favor. AT&T, 94 F.3d at 588.

26 If material facts are controverted or if the evidence is  
27 inadequate, a court may permit discovery to aid in determining

1 whether personal jurisdiction exists. Data Disc, Inc., 557 F.2d  
2 at 1285 n.1. If the submitted materials raise issues of  
3 credibility or disputed questions of fact, the district court  
4 has the discretion to hold an evidentiary hearing in order to  
5 resolve the contested issues. Id.

6 There are two independent limitations on a court's power to  
7 exercise personal jurisdiction over a non-resident defendant:  
8 the applicable State personal jurisdiction rule and  
9 constitutional principles of due process. Sher v. Johnson, 911  
10 F.2d 1357, 1361 (9th Cir. 1990); Data Disc, Inc., 557 F.2d at  
11 1286. California's jurisdictional statute is co-extensive with  
12 federal due process requirements; therefore, jurisdictional  
13 inquiries under State law and federal due process standards  
14 merge into one analysis. Rano v. Sipa Press, Inc., 987 F.2d  
15 580, 587 (9th Cir. 1993).

16 The exercise of jurisdiction over a non-resident defendant  
17 violates the protections created by the due process clause  
18 unless the defendant has "minimum contacts" with the forum State  
19 so that the exercise of jurisdiction "does not offend  
20 traditional notions of fair play and substantial justice."  
21 International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).  
22 Personal jurisdiction may be either general or specific.

23 General jurisdiction exists where the defendant's contacts  
24 with the forum State are so substantial or continuous and  
25 systematic that jurisdiction exists even if the cause of action  
26 is unrelated to those contacts. Bancroft & Masters, Inc. v.  
27 Augusta Nat'l, Inc., 223 F.3d 1082, 1086 (9th Cir. 2000). The

1 standard for establishing general jurisdiction is "fairly high."  
2 Id.; Brand v. Menlove Dodge, 796 F.2d 1070, 1073 (9th Cir.  
3 1986). The defendant's contacts must approximate physical  
4 presence in the forum State. Schwarzenegger, 374 F.3d at 801.  
5 Factors considered in evaluating the extent of contacts include  
6 whether the defendant makes sales, solicits or engages in  
7 business, designates an agent for service of process, holds a  
8 license, or is incorporated in the forum State. Bancroft &  
9 Masters, Inc., 223 F.3d at 1086.

10 Specific jurisdiction exists where the cause of action  
11 arises out of or relates to the defendant's activities within  
12 the forum. Data Disc, Inc, 557 F.2d at 1286. Specific  
13 jurisdiction is analyzed using a three-prong test: (1) the  
14 non-resident defendant must purposefully direct its activities  
15 or consummate some transaction with the forum or a resident  
16 thereof; or perform some act by which it purposefully avails  
17 itself of the privilege of conducting activities in the forum,  
18 thereby invoking the benefits and protections of its laws;  
19 (2) the claim must be one which arises out of or results from  
20 the defendant's forum-related activities; and (3) the exercise  
21 of jurisdiction must be reasonable. Lake v. Lake, 817 F.2d  
22 1416, 1421 (9th Cir. 1987). Each of these conditions is  
23 required for asserting jurisdiction. Insurance Co. of N. Am. v.  
24 Marina Salina Cruz, 649 F.2d 1266, 1270 (9th Cir. 1981).

25 A showing that a defendant "purposefully availed" itself of  
26 the privilege of doing business in a forum State typically  
27 consists of evidence of the defendant's actions in the forum,

1 such as executing or performing a contract there.  
2 Schwarzenegger, 374 F.3d at 802. The requirement of purposeful  
3 availment ensures that the defendant should reasonably  
4 anticipate being haled into the forum State court based on its  
5 contacts. World Wide Volkswagen Corp. v. Woodson, 444 U.S. 286,  
6 297 (1980). The purposeful availment test is met where "the  
7 defendant has taken deliberate action within the forum state or  
8 if he has created continuing obligations to forum residents."  
9 Ballard, 95 F.3d at 1498.

10 A showing that a defendant "purposefully directed" its  
11 conduct toward a forum State "usually consists of evidence of  
12 the defendant's actions outside the forum state that are  
13 directed at the forum, such as the distribution in the forum  
14 state of goods originating elsewhere." Schwarzenegger, 374 F.3d  
15 at 803. Purposeful direction may be established under the  
16 "effects test" where the defendant (1) committed an intentional  
17 act, (2) expressly aimed at the forum State, (3) causing harm  
18 that the defendant knows is likely to be suffered in the forum  
19 State. Dole Food Co. v. Watts, 303 F.3d 1104, 1111 (9th Cir.  
20 2002).

21 The second factor requires that the claim arise out of or  
22 result from the defendant's forum-related activities. A claim  
23 arises out of a defendant's conduct if the claim would not have  
24 arisen "but for" the defendant's forum-related contacts.  
25 Panavision Int'l v. L.P.U. Toeppa, 141 F.3d 1316, 1322 (9th Cir.  
26 1998).

27 Once the plaintiff has satisfied the first two factors, the  
28



1 defendant bears the burden of overcoming a presumption that  
2 jurisdiction is reasonable by presenting a compelling case that  
3 specific jurisdiction would be unreasonable. Burger King Corp.  
4 v. Rudzewicz, 471 U.S. 462, 472-73 (1985); Haisten v. Grass  
5 Valley Medical Fund, Ltd., 784 F.2d 1392, 1397 (9th Cir. 1986).  
6 Seven factors are considered in assessing whether the exercise  
7 of jurisdiction over a non-resident defendant is reasonable:  
8 (1) the extent of the defendant's purposeful interjection into  
9 the forum State's affairs, (2) the burden on the defendant,  
10 (3) conflicts of law between the forum State and the defendant's  
11 home jurisdiction, (4) the forum State's interest in  
12 adjudicating the dispute, (5) the most efficient judicial  
13 resolution of the dispute, (6) the plaintiff's interest in  
14 convenient and effective relief, and (7) the existence of an  
15 alternative forum. Caruth v. International Psychoanalytical  
16 Ass'n, 59 F.3d 126, 128 (9th Cir. 1995); Roth v. Garcia Marquez,  
17 942 F.2d 617, 623 (9th Cir. 1991).

18 II. Failure to State a Claim

19 A motion to dismiss for failure to state a claim will be  
20 denied unless it is "clear that no relief could be granted under  
21 any set of facts that could be proved consistent with the  
22 allegations." Falkowski v. Imation Corp., 309 F.3d 1123, 1132  
23 (9th Cir. 2002), citing Swierkiewicz v. Sorema N.A., 534 U.S.  
24 506 (2002). A complaint must contain a "short and plain  
25 statement of the claim showing that the pleader is entitled to  
26 relief." Fed. R. Civ. P. 8(a). "Each averment of a pleading  
27 shall be simple, concise, and direct. No technical forms of  
28

1 pleading or motions are required." Fed. R. Civ. P. 8(e). These  
2 rules "do not require a claimant to set out in detail the facts  
3 upon which he bases his claim. To the contrary, all the Rules  
4 require is 'a short and plain statement of the claim' that will  
5 give the defendant fair notice of what the plaintiff's claim is  
6 and the grounds on which it rests." Conley v. Gibson, 355 U.S.  
7 41, 47 (1957).

8 When granting a motion to dismiss, a court is generally  
9 required to grant a plaintiff leave to amend, even if no request  
10 to amend the pleading was made, unless amendment would be  
11 futile. Cook, Perkiss & Liehe, Inc. v. N. Cal. Collection Serv.  
12 Inc., 911 F.2d 242, 246-47 (9th Cir. 1990). In determining  
13 whether amendment would be futile, a court examines whether the  
14 complaint could be amended to cure the defect requiring  
15 dismissal "without contradicting any of the allegations of [the]  
16 original complaint." Reddy v. Litton Indus., Inc., 912 F.2d  
17 291, 296 (9th Cir. 1990). Leave to amend should be liberally  
18 granted, but an amended complaint cannot allege facts  
19 inconsistent with the challenged pleading. Id. at 296-97.

### 20 III. Venue

21 If the Court determines that venue is improper in the  
22 Northern District of California, it must dismiss or transfer the  
23 case. 28 U.S.C. § 1404(a).

24 Title 28 U.S.C. § 1404(a) provides as follows: "For the  
25 convenience of parties and witnesses, in the interest of  
26 justice, a district court may transfer any civil action to any  
27 other district or division where it might have been brought."

1 The statute, therefore, identifies three basic factors for  
2 district courts to consider in determining whether a case should  
3 be transferred: (1) convenience of the parties; (2) convenience  
4 of the witnesses; and (3) the interests of justice. 28 U.S.C.  
5 § 1404(a). The Ninth Circuit has held that a fourth factor for  
6 the court to consider is the plaintiff's choice of forum. See  
7 Securities Investor Protection Corp. v. Vigman, 764 F.2d 1309,  
8 1317 (9th Cir. 1985). The Securities Investor court held that,  
9 unless the balance of the § 1404(a) factors "is strongly in  
10 favor of the defendants, the plaintiff's choice of forum should  
11 rarely be disturbed." Id.; see also Decker Coal Co. v.  
12 Commonwealth Edison Co., 805 F.2d 834, 843 ("defendant must make a  
13 strong showing . . . to warrant upsetting the plaintiff's choice  
14 of forum"). The burden is on the defendant to show that the  
15 convenience of parties and witnesses and the interest of justice  
16 require transfer to another district. See Commodity Futures  
17 Trading Comm'n v. Savage, 611 F.2d 270, 279 (9th Cir. 1979).

18  
19 For purposes of venue, a corporation is deemed to reside  
20 in any judicial district in which it is subject to personal  
21 jurisdiction at the time the action is commenced. In a  
22 State which has more than one judicial district and in  
23 which a defendant that is a corporation is subject to  
24 personal jurisdiction at the time an action is commenced,  
25 such corporation shall be deemed to reside in any district  
in that State within which its contacts would be sufficient  
to subject it to personal jurisdiction if that district  
were a separate State, and, if there is no such district,  
the corporation shall be deemed to reside in the district  
within which it has the most significant contacts.

26 28 U.S.C. § 1391(c).  
27  
28

## DISCUSSION

## I. Personal Jurisdiction

## A. General Jurisdiction

Defendants contend that this Court has neither general or specific personal jurisdiction over them. Plaintiff first argues that CRT's business activities in California were sufficiently substantial and continuous to permit this Court to exercise personal jurisdiction over Defendants based on general jurisdiction. Plaintiff notes that Defendants signed eighteen Jack-in-the-Box franchise agreements that called for interpretation and enforcement under California law and provided for forum and venue in California for resolving any disputes. Plaintiff further alleges that CRT placed orders for and received goods from California suppliers. Plaintiff alleges that Thomas made at least one trip annually for at least the last ten years to Jack-in-the-Box headquarters in California.

Defendants do not operate a business in California, although they have interacted with Jack-in-the-Box in California for at least ten years, including by ordering supplies and visiting Jack-in-the-Box headquarters. However, these interactions with Jack-in-the Box do not suffice for general jurisdiction over Defendants.

The additional fact that Thomas negotiated in California for a contract for financial intermediary services is insufficient to meet the threshold.

## 1 B. Specific Jurisdiction

2 Plaintiff further argues that, at a minimum, this Court has  
3 specific jurisdiction over Defendants. In order to determine  
4 whether it may exercise specific personal jurisdiction over  
5 Defendants, the Court must analyze each prong of the three-part  
6 test for personal jurisdiction enumerated in Lake.

## 7 (1) Purposeful Availment and Purposeful Direction

8 Plaintiff argues that it shows that Defendants meet the  
9 purposeful availment requirement of Lake with allegations of  
10 Thomas's phone calls to Plaintiff's California office and a  
11 meeting between Plaintiff and Thomas in California, in April,  
12 2003, for the purpose of discussing a possible agreement for  
13 Plaintiff's services.

14 Thomas responds that she was traveling to California to see  
15 her sister and she met with Johnson while she was on that trip,  
16 but this does not contradict Plaintiff's allegations. While a  
17 contract was not signed at that meeting, a contract did result  
18 the following month from these and further negotiations. Thus  
19 Thomas took a deliberate action that created an obligation to  
20 Plaintiff, a California resident.

21 Defendants cite Roth for the proposition that simply having  
22 a contract with a California resident is insufficient to create  
23 specific jurisdiction. See 942 F.2d at 621. While that is  
24 true, in Roth the court went on to find personal jurisdiction  
25 because most of the work called for by that single contract was  
26 performed in the forum. Id. at 622. Likewise, CRT here signed  
27 a contract with a California company that regularly conducts

1 business in California and that did a large part of the work  
2 contracted for in California. Plaintiff has demonstrated that  
3 Defendant CRT purposely availed itself of the privilege of  
4 conducting business in California, and that Thomas negotiated  
5 for the contract in California.

6 Plaintiff also claims that Defendants defrauded Plaintiff  
7 in California because Thomas falsely told Plaintiff that Thomas  
8 and Campbell each owned fifty percent of CRT and Thomas  
9 concealed any interest in CRT owned by Olguin. Plaintiff adds  
10 that Thomas and/or Campbell told it, after the May, 2004  
11 purchase agreement with Olguin was signed, that no transaction  
12 had taken place.

13 Thus, the amended complaint alleges intentional activity,  
14 partly undertaken by Thomas in California, aimed at a California  
15 corporation that caused harm which Defendants should have known  
16 would be suffered in California by Plaintiff.

17 These activities are sufficient to establish the first  
18 prong of the requirements for specific jurisdiction over  
19 Defendants CRT and Thomas. However, Plaintiff does not allege  
20 that Campbell traveled to California, or conducted negotiations  
21 or made false statements here. Jurisdiction over Campbell may  
22 not be exercised simply by virtue of his partnership in CRT.  
23 See Sher, 911 F.2d at 1365. Accordingly, the Court may not  
24 exercise personal jurisdiction over him.

25 (2) Arising Out Of

26 The second prong of the Lake test addresses whether the  
27 claim arises out of or results from the defendant's forum-

1 related activities. Applying the Panavision Int'l "but-for"  
2 test, the question, therefore, is this: but for Defendants'  
3 contacts with California, would Plaintiff's claims have arisen?

4 The answer is clearly no. If CRT had not entered into the  
5 contract at issue, Plaintiff would have no claims against  
6 Defendants. It is precisely Thomas and CRT's forum-related  
7 activities that gave rise to each of Plaintiff's claims. For  
8 purposes of specific personal jurisdiction analysis, Plaintiff's  
9 claims arise out of Thomas and CRT's forum-related activities.

10 (3) Reasonableness

11 Finally, the third prong of the Lake test requires that  
12 jurisdiction be reasonable. Here, the first two prongs of the  
13 requirements for personal jurisdiction over CRT and Thomas have  
14 been met. Therefore, they must overcome the presumption of  
15 reasonableness by addressing the seven factors listed in Roth.  
16 In Defendants' motion to dismiss, they contend that they meet  
17 the criteria because they did not purposefully interject  
18 themselves into California but instead sought to be governed by  
19 Arizona law. They also argue that conflicts of law are not  
20 relevant because the contract states that Arizona law will  
21 govern disputes and that Arizona can serve as an alternative  
22 forum. As well, Defendants assert they will be burdened by  
23 having to litigate in California. Id.

24 Defendants do not address Plaintiff's interest in  
25 convenience, California's interest in adjudicating the dispute  
26 or why Arizona would be the most efficient location for judicial  
27 resolution. An intent to avoid the jurisdiction of another

1 forum is not equivalent to an intent to avoid the benefits of  
2 the other forum's market. Haisten, 784 F.2d at 1401.  
3 Defendants CRT and Thomas sought out a company based in  
4 California, knowing its base of potential purchasers would be  
5 from California; they sought the benefit of California's market  
6 for investment. California has a strong interest in assuring  
7 that contracts made with its residents are not breached and that  
8 its residents are not defrauded. Defendants have given no  
9 evidence that the burden of traveling from Arizona to California  
10 would be great, especially considering that most of the dispute  
11 revolves around interpretation of a written contract. Because  
12 the Court rules that Defendants CRT and Thomas purposefully  
13 availed themselves of the privilege of conducting business in  
14 California and directed their activities at a California  
15 corporation, their arguments are similarly unpersuasive here.  
16 Defendants CRT and Thomas have not carried their burden to show  
17 that the exercise of specific personal jurisdiction over them in  
18 this case is unreasonable.

19 This Court's exercise of specific personal jurisdiction  
20 over Defendants CRT and Thomas is reasonable and affords them  
21 the process that they are due. Defendants' connections with  
22 California are such that they should reasonably anticipate being  
23 haled to court here, World-Wide Volkswagen, 444 U.S. at 297, and  
24 they have established such minimum contacts with California that  
25 the exercise of specific personal jurisdiction over them "does  
26 not offend traditional notions of fair play and substantial  
27 justice." International Shoe, 326 U.S. at 316.



1 Therefore, the Court grants Defendants' motion to dismiss  
2 the claims against Campbell and denies the motion to dismiss the  
3 claims against CRT and Thomas.

4 II. Failure to State a Claim

5 Defendants assert that Plaintiff has failed to state a  
6 claim upon which relief can be granted. Defendants argue that  
7 Arizona law requires Plaintiff to have a real estate broker's  
8 license to perform the contract between Plaintiff and CRT  
9 because the restaurants for sale were situated on leased land,  
10 and the proposed sale of the business was ancillary to or  
11 contingent on the re-negotiation of these leases. Defendants  
12 claim that Plaintiff does not have a real estate broker's  
13 license, and therefore that the contract is illegal and cannot  
14 be enforced.

15 Arizona Revised Statutes section 32-2101(47)(n)(2004)  
16 states that a real estate broker's license is required by a  
17 person other than a salesperson who "[e]ngages in any of the  
18 acts listed in subdivisions (a) through (m) of this paragraph  
19 for the sale or lease of other than real property if a real  
20 property sale or lease is a part of, contingent on or ancillary  
21 to the transaction." Subsection (i) lists "[a]ssists or directs  
22 in the procuring of prospects, calculated to result in the sale,  
23 exchange, leasing or rental of real estate or timeshare  
24 interests" as one such act. As well, section 32-2122 states  
25 that an "act, in consideration or expectation of compensation,  
26 which is included in the definition of a real estate . . .  
27 broker, whether the act is an incidental part of a transaction

1 or the entire transaction, constitutes the person offering or  
2 attempting to perform the act of a real estate broker."  
3 Finally, section 32-2152 requires a broker's claim for  
4 compensation to allege in the complaint that "the plaintiff was  
5 a qualified licensed broker or salesperson at the time the claim  
6 arose." Defendants cite two statements in Plaintiff's  
7 Descriptive Report that describe the leases of the real estate  
8 on which the restaurants for sale were situated, and potential  
9 terms for assuming those leases, as evidence that the assignment  
10 of the leases to a buyer was at least ancillary to the contract  
11 between Plaintiff and CRT. Mot. to Dismiss, Ex. A & B. Thomas  
12 declares that the proposed sale was contingent on the transfer  
13 of the leases because the businesses could not run without them.  
14 Thomas Dec. ¶ 3.

15 Plaintiff does not allege that it has a real estate  
16 broker's license, but instead asserts that the contract between  
17 Plaintiff and CRT did not pertain to real estate. Plaintiff  
18 notes that the contract expressly excluded real estate as part  
19 of any potential transaction. The transaction that did occur,  
20 that is, the transfer of Thomas's interest to CRT by means of  
21 the May 8, 2004 purchase agreement, did not include Thomas's  
22 interest in the separate entities that owned the real estate on  
23 which fourteen of the restaurants were situated. It was merely  
24 subject to a condition precedent that CRT's leases be amended to  
25 reflect the change in CRT's principals. Indeed, if Olguin was  
26 already a partner in CRT at the time of CRT's purchase of  
27 Thomas's interest, the leases for the land on which the

1 restaurants were situated were not assigned or sublet to anyone,  
2 but only amended, and no real estate transaction occurred.

3 In Cambridge Co. v. Arizona Lawn Sprinklers, Inc., 801 P.2d  
4 504, 506 (Ariz. App. 1990), the court allowed the plaintiff to  
5 recover a fee for assisting in the sale of a corporation even  
6 though the plaintiff did not have a real estate broker's  
7 license, the sale could have included a real estate transaction  
8 and performance of the contract could thus have been illegal.  
9 The court stated that the test for an illegal contract focused  
10 on how the contract was performed, not how it could have been  
11 performed. Id. The court noted that the real estate  
12 transaction that did occur did not involve the parties to the  
13 contract for the sale of the corporation. Id. Here, the May 8,  
14 2004 transaction that did occur involved the amendment of leases  
15 to reflect the withdrawal of a partner of CRT, not the  
16 assignment or sublease of leases from CRT to another entity;  
17 thus, no real estate transaction occurred.

18 Defendants assert that this ruling in Cambridge was  
19 overruled by the addition of subsection (n) to section 32-  
20 2101(47). Defendants seem to contend that, under subsection  
21 (n), even a contract that might include a real estate  
22 transaction is illegal. Defendants do not cite any authority  
23 for this contention and it is not clear whether it is correct.  
24 Even if it is, the court in Cambridge also pointed out that the  
25 acquisition of a company that holds leases for land on which it  
26 operates can be structured in such a manner that a real estate  
27 transaction is not involved (such as through the purchase of  
28

1 stock in the corporation owning the leases). Id. Plaintiff's  
2 amended complaint alleges that its contract with CRT excluded  
3 the leaseholds, and that therefore any sale would have been  
4 conducted without a real estate transaction. Plaintiff may be  
5 able to prove a claim that does not imply a violation of  
6 subsection (n). Therefore, Defendants' motion to dismiss for  
7 failure to state a claim is denied.

8 At the hearing, Plaintiff represented that Johnson does  
9 have a California real estate broker's license and that the  
10 Arizona statute allows him to conduct transactions such as the  
11 one at issue. Although the Court denies Defendants' motion to  
12 dismiss, the Court stated that Plaintiff could, in an abundance  
13 of caution, file an amended complaint to make this allegation.  
14 Plaintiff filed an amended complaint on July 7, 2005.

15 III. Venue

16 Defendants argue that venue should be transferred to the  
17 District of Arizona for the convenience of the witnesses and in  
18 the interests of justice. In support of their motion,  
19 Defendants argue that most of the known potential witnesses live  
20 in Arizona and that there is no indication that a transfer would  
21 slow proceedings because this Court has not made any rulings.

22 While Defendants reside in Arizona, Plaintiff and Johnson  
23 reside in California. Further, as Plaintiff notes, three of the  
24 potential witnesses Defendants have identified, Thomas, Campbell  
25 and Johnson, are parties to the suit. Defendants have  
26 identified only Olguin and CRT's counsel as possible non-party  
27 witnesses, and have not identified any documentation or other  
28

1 evidence in Arizona or other factors that would heavily burden  
2 Defendants in trying a case in California. Moreover, Defendants  
3 regularly travel outside of Arizona for business purposes.  
4 Plaintiff's choice of venue is not lightly disturbed. The  
5 balance of factors does not strongly favor Defendants so as to  
6 overcome Plaintiff's choice. Therefore, the Court denies  
7 Defendants' motion to transfer venue.

8 CONCLUSION

9 For the foregoing reasons, the Court DENIES Defendants'  
10 motion to dismiss the claims against CRT and Thomas and their  
11 alternative motion to transfer venue (Docket No. 23).  
12 Defendants' motion to dismiss the claims against Defendant  
13 Campbell for lack of jurisdiction is GRANTED. If Plaintiff were  
14 to sue Defendant Campbell in Arizona, however, the Court would  
15 transfer this action there.

16 IT IS SO ORDERED.

17  
18  
19  
20 Dated: 7/21/05

\_\_\_\_\_  
/s/ CLAUDIA WILKEN  
CLAUDIA WILKEN  
United States District Judge